(20)

No. 367.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

FANNIE L. LONAS, *Petitioner*

v.

NATIONAL LINEN SERVICE CORPORATION, *Respondent.*

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE LINEN SUPPLY ASSOCIATION OF AMERICA, INC., AS AMICUS CURIAE, IN OPPOSITION.

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PRELIMINARY STATEMENT.

The Linen Supply Association of America, Inc. is a national association of individual linen service companies. A large portion of the business of every linen service company is devoted to serving industrial and commercial cus-

tomers. The instant case is of concern to members of the Association.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 37) is reported at 136 F (2d) 433.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 22, 1943 (R. 36). The petition for a writ of certiorari was filed September 18, 1943. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Respondent is a linen service establishment whose principal customers are commercial and industrial concerns. The greater part of its business is intrastate. The question presented is whether Respondent is exempt as a "service establishment" under Section 13 (a)(2) of the Fair Labor Standards Act.

STATUTORY PROVISION INVOLVED.

Paragraph (a) of Section 13 of the Fair Labor Standards Act of 1938, hereafter referred to as the Act, (Act of June 25, 1938, 52 Stat. 1067, as amended, 29 U. S. C. Sec. 213) provides in part:

> The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employees employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

STATEMENT.

The opinion of the court below points out (R. 37) that this case presents the narrow question whether Respondent is a service establishment exempt from the requirements of the Act by Section 13 (a)(2). The brief of Amicus Curiae is directed at this sole question. In the interest of brevity, Amicus Curiae accepts the statement of the case as set forth in Respondent's brief. The pertinent facts therein clearly indicate that Respondent is a service establishment which does the greater part of its business intrastate. The principal portion of its business, however, is devoted to serving industrial and commercial customers.

ARGUMENT.

RESPONDENT'S ESTABLISHMENT IS EXEMPT FROM THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE ACT AS A SERVICE ESTABLISHMENT UNDER SECTION 13(a)(2).

Petitioner's Position.

Section 13(a)(2) of the Act exempts from the minimum wage and overtime provisions of the Act—

> any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Petitioner contends, *inter alia*, that the service establishment exemption extends only to those establishments having the characteristics of retail stores and that service establishments which sell their services principally to industrial and commercial users are not retail establishments.[1] Petitioner then concludes that Respondent is

[1] In Interpretative Bulletin No. 6, the Wage and Hour Division specifies that 75% of a laundry's business must be retail in order to qualify as a service establishment within the meaning of Section 13(a)(2). (Pet. Br. Append. par. 18, 28, 2 C. C. H. Labor Law Service, par. 32,106.)

not entitled to the exemption as a retail service establishment because sixty per cent of the customers it serves are industrial or business concerns as distinguished from private individuals. (Pet. Br. pp. 12-13.)

Position of Amicus Curiae.

Amicus Curiae submits that the court below properly held that Respondent's establishment was included within the exemption of Section 13 (a)(2) of the Act because it was a service establishment, the greater part of whose servicing was intrastate.

Scope of Term "Service Establishment."

1. *The Language of Section 13 (a)(2).* The plain language of the Act compels the conclusion that Respondent's establishment is embraced within the exemption of Section 13 (a)(2) as a service establishment, regardless of the number of commercial customers it serves. The court below describes the clear purport of the exemption as follows:

> Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be in intrastate commerce, and in the case of a service establishment, the greater part of its servicing must be in intrastate commerce. Had the congress intended to limit the exemption of service establishments to those which perform services for private individuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose.[2] (R. 38)

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[2] Petitioner argues (Pet. Br. p. 14) that "the words 'retail' and 'service' are used conjunctively [sic] and a service establishment must be in the nature of a retail establishment." This argument is without foundation. It is obvious that the joining word in Section 13 (a) (2) is the disjunctive "or" which is normally used to indicate that only one of several requirements of a statutory provision need be fulfilled. Horack, *Cases on Legislation*, (Callaghan and Co. 1940) p. 796.

It is well settled that the words of a statute will be given their usual, ordinary, and commonly accepted meaning. *Old Colony Trust Company* v. *Commissioner*, 301 U. S. 379, 383. Congress is presumed to have used words in their natural sense. *Helvering* v. *Hutchins*, 312 U. S. 393, 396. In the light of these principles Amicus Curiae submits that the following arguments demonstrate that Respondent's establishment is the type of service establishment which Congress contemplated would be exempt under Section 13 (a) (2).

Petitioner concedes (Pet. Br. p. 8) and it is beyond question that family laundries are local services exempt under Section 13 (a) (2). Similarly, the Government's Interpretative Bulletin No. 6, upon which Petitioner relies, concedes (Pet. Br. Append. par. 18, 28) that any laundry or linen service company which does less than 25 per cent of its business with industrial or commercial customers is likewise exempt under Section 13 (a) (2). This effort, however, to create an artificial distinction between a family laundry and a commercial laundry is without substance. There is no logical distinction between them with respect to their characters as local pursuits. They are both essentially localized community services, employing the same type of persons, using the same type of equipment, performing similar functions, and, in a direct sense, competing for the same business (see *infra*, pp. 15-16). The artificial and arbitrary character of the distinction urged by Petitioner is revealed by the uniform practice of the various agencies of the Federal Government to classify family laundries, commercial laundries, and linen service companies in the same category. Following are several illustrations taken from publications of Federal agencies:

UNITED STATES DEPARTMENT OF LABOR.

(1) *The Effect of Minimum Wage Determinations in Service Industries*, Bulletin No. 166 of the Women's Bureau of the United States Department of Labor (1938).

In a chapter of this publication describing "power laundries" appears the following statement classifying all branches of this industry as "laundries":

> * * * There are differences from laundry to laundry in the proportions of the sexes employed. * * * Where damp-wash and partially-ironed service to families is an important part of the laundry's business, very few ironers are required. When linen service to hotels, apartment, restaurants, doctor's offices and office buildings is added, for each washer a number of operators on flat work ironers would be needed. (p. 263)[3]

(2) *The Woman Wage Earner—Her Situation Today*, Bulletin No. 172 of the Woman's Bureau of the United States Department of Labor (1939). This publication treats all branches of the laundry industry as a single service trade. The various factors which led Congress to exempt service establishments are recited in this Bulletin together with the following statement that the Act is not applicable to laundry services:

> State minimum-wage authorities usually have made it a policy to issue wage orders first in great intrastate industries: Retail trade, laundries, dry cleaning, and dyeing, hotels and restaurants, beauty parlors. This has been done because (1) Federal laws do not apply; * * * (p. 19).

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[3] Another Bulletin issued by the Women's Bureau entitled *Summary of Earnings and Hours in the Service Industries of Maryland, 1940*, includes a survey of 36 laundries employing 2,187 workers. No distinction is drawn between "retail" laundries and "industrial" laundries. In the card catalog of the U. S. Department of Labor Library are nearly one hundred references to the laundry trades and working conditions therein. An examination of these references revealed unanimity in description of the laundry trades as service industries. There is not a single instance of an effort to distinguish between wholesale and retail laundries.

Nowhere in this Bulletin is there a distinction drawn between laundries upon the basis of customers it serves.

UNITED STATES DEPARTMENT OF COMMERCE.

The Census of Service Establishments, 1939, 16th Census of the United States, 1940, (Monthly Employment and Sex of Employees), published by the Bureau of the Census of the United States Department of Commerce, classifies both commercial and non-commercial laundries under the same category. Table 4A on page 3 of this Census lists the following group under the heading "personal service."

Laundries, Hand .....
Laundries, power, total .....
Doing linen supply service only .....
Doing 50 per cent or more linen supply service
Doing no linen supply service .....

NATIONAL RECOVERY ADMINISTRATION.

The Code of Fair Competition for the Laundry Trade (No. 281) placed all types of laundries in a single classification.[4] At no stage in the development of the N. R. A. Laundry Code was there any suggestion that laundry services for hotels, restaurants, offices or commercial establishments be treated differently from laundry services for individual customers.

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[4] See *Industry and Business Classification*, issued in 1933 by the N. R. A. Division of Economic Research and Planning in cooperation with the Bureau of the Census, the Bureau of Labor Statistics of the U. S. Department of Labor, and the Central Statistical Board [available at United States Archives]. On page 9 appears the following classification:

040. *Laundries.* Steaming, dry cleaning, dyeing (not textile dyeing, see 081); coat or towel service (all types, hand laundry, power laundry, etc.) * * *

["Coat and towel service" is a common name for linen service companies.]

STATE MINIMUM WAGE REGULATIONS.

Further evidence that all branches of the laundry trade are considered in a single category is found in the various State minimum wage orders. In every instance the wage rates and other requirements are identical for all kinds of laundry work. The following definition of "Laundry Trade" contained in the Ohio Laundry Occupations Order (effective March 26, 1934) is typical.

> *Laundry Trade*
>
> (1) Washing, ironing, or processing incidental thereto, for compensation, of clothing, napery, blanket, bed clothing, or fabric of any kind whatsoever;
>
> (2) The collecting, sale, resale, or distribution at retail or wholesale, of laundry services;
>
> (3) The producing of laundry service for their own use by business establishments, clubs, or institutions.[5]

It is apparent from the foregoing uniform views of Federal and State Government agencies that Congress did not intend to distinguish between commercial laundries and "retail laundries." Such a distinction must be predicated upon an entirely novel concept of the classification of laundries.

Amicus curiae does not contend, as petitioner suggests (Pet. Br. pp. 9-10) that every business or industry which renders a service thereby becomes a "service establishment" within the meaning of Section 13(a)(2). Amicus curiae concedes that many establishments render services in connection with their activities, which cannot be considered "service establishments" under Section 13(a)(2). The phrase "service establishment" has a clear and unambiguous meaning in the field of labor legislation, and may, in fact, be characterized as "words of art." Encompassed

[5] Nearly identical language is contained in laundry wage orders of the following states: Connecticut, New Hampshire, Colorado, North Dakota, Oklahoma, Pennsylvania, and others.

within the phrase are laundries, restaurants, hotels, barber shops, beauty parlors, shoe repair and tailor shops, and similar local pursuits. Congress intended and should be presumed to have used the phrase in accordance with its well-established meaning. *Helvering* v. *Hutchins*, 213 U. S. 393, 396.

2. *The Intent of Congress.* As the court below pointed out Section 13 (a)(2) "is without ambiguity." (R. 39) Therefore, it is unnecessary to resort to extrinsic aids to ascertain the legislative intent of the Section. *Kuehner* v. *Irving Trust Company*, 299 U. S. 45, 49. Nevertheless, an examination of the legislative history of the Act in the light of the evil sought to be remedied[6] lends ample support to the view that Respondent's establishment is a "service establishment" within the purview of Section 13 (a)(2).

The language of Section 13 (a)(2) was born in Conference Committee after the House and Senate could not agree upon the final form of the bill. It first appeared in the confidential Conference Committee prints dated June 10, 11, and 12, 1938, respectively. The original language of the Conference Committee drafts limited the exemption to "any employee engaged in any retail establishment the greater part of whose selling is in intrastate commerce." However, the final Conference Committee Report expanded the exemption to include "any employee engaged in any retail or *service* establishment the greater part of whose selling or servicing is in intrastate commerce" (Italics Supplied) (H. Rep't 2738, 75th Cong., 3d Sess., 1938).

Petitioner ascribes (Pet. Br. pp. 13-14) significance to the fact that the language of Section 13 (a)(2) exempting "service establishments" does not appear until the final Conference Committee report. This is explained by the history of the passage of the Act. The Bill which passed the Senate (and was amended in some respects by the House) differed radically from the Bill reported by the Conference

[6] *Cf. Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

Committee which was finally enacted. The Senate Committee Bill (S. 2475), passed by the Senate July 31, 1937, did not automatically extend its wage and hour requirements to any occupation or industry. Instead, a five man Labor Standards Board was created, authorized to establish minimum wages for specific occupations upon a finding that such action would not curtail opportunities for employment.[7]

When the Conference Committee rewrote the Senate and House Bills to provide for automatic coverage of all employees "engaged in commerce or in the production of goods for commerce" it was necessary to insert a clause to exclude specifically from the operation of the Act those activities which under the previous approach could not have been designated by the proposed Labor Standards Board. To meet this necessity the language of Section 13 (a)(2) was inserted.[8]

Evidence of the general purpose of the Act to exclude local services appears in the following excerpt from Presi-

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[7] Sec. 4 (a) of S. 2475 provided:

"* * * it is declared to be the policy of this Act to maintain so far as and as rapidly as is economically feasible minimum wage and maximum hour standards at levels consistent with health, efficiency and general well being of workers and the maximum productivity and profitable operation of American business.

(b) Having regard to such policy, and upon finding after notice and hearing as hereinafter provided, that the application of the minimum wage provisions of this Act to any occupation or occupations will not curtail opportunities for employment, the Board shall by order from time to time declare, for such occupations, minimum wages which shall be as nearly adequate as is economically feasible without curtailing opportunity for employment to maintain a minimum standard of living necessary for health, efficiency and general well being. (S. 2475, as passed by the Senate July 31, 1937.)

[8] Petitioner attaches importance to the fact that the inclusion of service establishments by the Conference Committee provoked no discussion in Congress. (Pet. Br. p. 14.) The answer, of course, is that the inclusion of "service establishments" merely effectuated the general purpose of Congress. It is only natural that no discussion would be provoked concerning the inclusion of language that accomplished the purpose of Congress to exclude local pursuits.

dent Roosevelt's original message requesting Congress to enact the Act:

> Although a goodly portion of the goods of American industry moves in interstate commerce * * * there are many purely local pursuits and *services* which no Federal legislation can effectively cover. (Italics supplied)
>
> (p. 3, S. Rep't No. 884, 75th Cong. 1st Sess.)

Similarly the Report of the Senate Committee on Education and Labor manifests the underlying purpose to exclude local community enterprise from the Act. The Report[9] states:

> The bill carefully excludes from its scope business in the several states that is of a purely *local* nature. * * * *It leaves to state and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce.* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to be near state lines and solely on account of such locations, actually serve a wholly local community within two states.[10] Italics supplied)
>
> (p. 5, S. Rept. No. 884.)

During the course of debate, Senator Black who was in charge of the bill in the Senate defined the scope of the bill in the following language:

> We eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various *service employments throughout the Nation.* * * * I be-

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[9] Committee reports and explanatory statements made by the Senate and House members in charge of a bill during its passage are important aids in ascertaining the intent of Congress. *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443, 474, 475; *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 463.

[10] *Cf. Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 570.

> lieve it was the prevailing * * * if not the unanimous sentiment of the committee, that *businesses of a purely local type which serve a particular local community* * * * can be better regulated by the laws of the communities and of the states * * *.[11] (Italics supplied)
>
> (Cong. Rec., Vol. 81, p. 7648, 75th Cong., 1st Sess.)

These expressions of the President, the managers of the Bill in both the House and Senate, and the Senate Committee Report clearly reflect the unequivocal purpose of Congress to avoid regulation of local service establishments in contradistinction to such non-local establishments.[12] It is apparent from the foregoing discussion (*supra* pp. 4-9) that linen service establishments have traditionally been classified with the type of local service establishments contemplated by the exemption. Petitioner,

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[11] Congresswoman Norton who was manager of the bill in the House during the course of debate reiterated the intent of Congress to avoid regulation of local business. She pointed out that:

> This bill does not attempt to put the clamp of Federal regulation on local business. Such activities remain within the protection of the several states.
>
> (Cong. Rec. Vol. 82, p. 1392, 75th Cong. 2d Sess.)

Later in the course of discussion in the House the following colloquy occurred:

> Mr. Dempsey. * * * May I ask * * * whether by the wildest stretch of imagination, or regardless of any possible administrative interpretations, this bill can in any way affect such business as that of the local groceryman, druggist, clothing store, meat dealer—any merchant, in fact—laundry, hospital, hotel, or even transportation companies operating solely within a state?
>
> "Mrs. Norton. Absolutely not.
>
> (Cong. Rec., Vol. 83, p. 7299, 75th Cong., 3d. Sess.)

[12] At the joint hearings before the Senate Committee on Education and the House Committee on Labor, Mr. Leon Henderson testified that the bill was not intended to apply to the thirteen and one-half million persons who were employed in "distribution and service." (Testimony of Leon Henderson at Joint Hearings on S. 2475 and H. R. 7200 before Senate Committee on Education and Labour and House Committee on Labor, 75th Cong. 1st Sess.)

however, seeks to frustrate this expressed purpose by narrowing the exemption of Section 13 (a)(2) to "retail" business.[13]

3. *Wage and Hour Division Interpretative Bulletin No. 6.* Petitioner argues that Interpretative Bulletin No. 6, is entitled to great weight. (Pet. Br. p. 10.) This Bulletin (Pet. Br. Append.) states, *inter alia,* that a service establishment ceases to be a service stablishment within the meaning of Section 13(a)(2) if more than 25 per cent of its service is for industrial or commercial customers. Prior to June 1941, the Wage and Hour Division promulgated the view that a service establishment lost its exemption if more than 50 per cent of its service was for industrial or commercial customers.[14]

While it is true that courts will give consideration to long-established rulings, it is equally well settled that under no circumstances are courts bound by an administrative interpretation. *United States* v. *Missouri Pacific Railway Company,* 278 U. S. 269, 280. Especially is this true where

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[13] Recently Congressman Fred A. Hartley, Jr., expressed his opinion concerning the scope of Section 13 (a) (2). Although the statement is not contemporaneous with the passage of the Act, it is entitled to great consideration. Congressman Hartley was ranking member of the House Labor Committee which handled the Act as well as a member of the Conference Committee which drafted the final language of Section 13 (a) (2). Congressman Hartley stated:

> * * *
>
> * * * there was no intention to draw a line between some of these local service establishments because of the kind of customers served. For example, laundries have always been considered service establishments. There is a definite local area served. Most laundries * * * do work for restaurants, or barber shops, or hospitals, or hotels, or stores. But they are still laundries, and as such, service establishments.
>
> (Cong. Rec. Vol. 89, p. A 1023-4, 78th Cong. 1st Sess.)

Cf. Statement of Wage-Hour Administrator, L. Metcalfe Walling, *infra,* pp. 14-15.

[14] C. C. H. Labor Law Service, par. 25,551.

the construction as in the instant case has not been uniform and consistent. *Burnet* v. *Chicago Portrait Company*, 285 U. S. 1, 16. This Court in *Neuberger* v. *Commissioner*, 311 U. S. 83, 89, pointed out that administrative rulings "cannot narrow the scope of a statute when Congress plainly has intended otherwise." See also *Fleming* v. *Belo Corporation*, 121 F. (2d) 207, 213, (C. C. A. 5) (Aff'd. 316 U. S. 624).[15]

An examination of Section 13 (a) of the Act (*supra* p. 2) shows that Congress deliberately omitted to grant the Administrator discretion to interpet the scope of the term "service establishment." It is highly significant that the Administrator is specifically authorized to define the terms appearing in Section 13 (a)(1) of the Act, but similar authority is not granted in Section 13 (a)(2). Thus it is apparent that the arbitrary and erroneous definition of "service establishment" in the Bulletin exceeds the scope of the Administrator's authority.[16]

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[15]At pages 213-214 of this case the court points out that the case of *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, which Petitioner cites (Pet. Br. p. 10), as support for his statement as to the weight of the Administrator's interpretation, is inapposite.

[16] It is important to note that the personal opinion of the present Wage and Hour Administrator, L. Metcalfe Walling, is squarely opposed to the definition of "service establishment" in Interpretative Bulletin No. 6. Following are excerpts of Mr. Walling's letters to Congressman Hartley which appeared in the Congressional Record (Vol. 89, pp. A 1024-25, 78th Cong. 1st Sess.). *Cf. Greeley* v. *Thompson*, 51 U. S. 225, 234; *Walling* v. *Belo Corporation*, 316 U. S. 624, 630.

* * *

> I am very much inclined to the view that all laundries, regardless of whether they do so-called commercial work or not, were intended by the Congress to be exempt, as you definitely state, and regardless of the outcome of the litigation I am inclined at the present time to think that our interpretation should be revised in this regard. * * * (Letter of July 2, 1942)

* * *

> As my letter of July 2, 1942, indicated, I have personally felt very strongly that the word "service" as used in sec-

4. *Practical Considerations.* Persuasive practical factors also support the conclusion that Respondent is exempt as a service establishment. The same fundamental attributes which characterize retail laundries as local service establishments are present in the case of Respondent. Both are primarily local community services. A linen service company, like a retail establishment, does not, in general compete with similar establishments in other communities and other States. It does not use the channels and instrumentalities of commerce to spread "undesirable labor conditions among the workers of the several States" which the policy section of the Act (Section 2(a)) declares is one of the evils sought to be remedied. If the wages are low or the hours long in the case of a local service establishment the condition is localized in the community. If the wages and hours prevailing in a local service establishment in a neighboring state or community are good, they are not threatened by the competition of a low wage community because intrinsically the area of competition is circumscribed.

The distinction between commercial and retail laundries in Interpretative Bulletin No. 6 is also illogical and unjust in its application. There are some so-called "retail laundries" of great size which do family laundry work primarily. However, under the Bulletin they are permitted to do up to 25 per cent of their total business with commercial customers before they lose their exemption under Section 13(a)(2). It is obvious that they are permitted to do

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tion 13 (a) (2) of the Fair Labor Standards Act is not limited by the term "retail" appearing in the same section.

* * *

These facts have been put before the circuit court of appeals in the case of *Lonas* v. *National Linen Service Corporation* for the purpose of clarification, and it is for this reason principally that the brief has been filed. I shall be inclined to an immediate clarification of interpretative bulletin No. 6, including the interpretation of the term "service establishments" if the circuit court of appeals sustains the district court in this matter. * * * (Letter of February 22, 1943)

a vastly greater volume of commercial work without exceeding the 25 per cent limitation than a small linen service company all of whose customers are commercial. It is clear that Congress did not intend such an unfair competitive result. In *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 570, the Government argued that the appellee who was doing a local wholesale business should be covered by the Act because otherwise its interstate competitors would be at a competitive disadvantage. In the instant case, where the situation is reversed, the same logic applies.

CONCLUSION.

The decision below is correct, and no conflict of decisions or any question of general importance is presented. Amicus Curiae, therefore, respectfully submits that the petition for a writ of certiorari should be denied.

LINEN SUPPLY ASSOCIATION OF AMERICA, INC.
Amicus Curiae.

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